



May 27, 2011

Marlene H. Dortch, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Amendment of the Commission's Rules Related to Retransmission Consent
MB Docket No. 10-71***

Dear Ms. Dortch:

This letter supplements the National Association of Broadcasters' ("NAB") comments on the Petition for Rulemaking and *ex parte* comments in the above-captioned proceeding. Allbritton Communications Company ("Allbritton") echoes the NAB's assertion that the Commission lacks authority under the Communications Act to mandate carriage without consent or to force parties to submit to arbitration. We write separately, however, to share Allbritton's experiences and specific data points as they relate to retransmission consent negotiations with multichannel video program distributors ("MVPD"). Based upon our experience in negotiating hundreds of retransmission consent agreements across the country for almost two decades on behalf of large and small stations with large and small MVPDs, we believe that our experience is representative of the industry as a whole.

THE ALLBRITTON STATIONS

Allbritton, through its affiliates, owns eight full-power television stations¹ in seven markets, each one affiliated with the ABC Television Network. A primary mission of these stations is to provide local programming and service to surrounding communities -- programming and service *not* provided by *any* MVPD. Our station contributions are lauded again and again for their profound positive impact on those communities. Six Allbritton stations

¹ WJLA-TV, Washington, DC; WHTM-TV, Harrisburg, PA; WSET-TV, Lynchburg, VA; WCIV, Charleston, SC; WCFT-TV/WJSU-TV/WBMA-LD, Birmingham, Tuscaloosa, Anniston, AL; KATV, Little Rock, AR; and KTUL, Tulsa, OK.

have been awarded the prestigious *NAB Service to America Award* for exceptional contributions to their local constituencies. Our Harrisburg, Pennsylvania, affiliate, for example, will receive this award next week for its “Operation Safe Kids” project: a multifaceted campaign to encourage residents to take proactive steps to protect themselves and loved ones from fires. The project distributed over 50,000 smoke alarms across Central Pennsylvania. In other markets, our stations are just as locally-focused. Last month, when devastating tornados struck Tuscaloosa, Alabama, our affiliate there was credited in scores of letters for *saving viewers’ lives*. As people only began to assess the aftermath, the station team orchestrated the region’s first broadcast fundraiser. Our stations know that their success relies on providing local news to their surrounding communities, and they endeavor to reach out daily with coverage of local political campaigns, emergency weather reports, local college and high school sporting events and other local events that affect their communities. In conjunction with providing the most watched national programming in the country, it is in this context that we seek carriage of our stations on MVPD systems.

EXISTING RETRANSMISSION CONSENT NEGOTIATIONS

Allbritton’s television stations reach the majority of the over 5,773,000 television households in our 7 markets through the retransmission of their broadcast signals by several hundred cable systems, both nationwide direct broadcast satellite systems, and other MVPDs of all sizes – from multibillion-dollar, diversified media companies like DIRECTV, Verizon FiOS, and Comcast to local co-operatives and municipally-owned telephony-based systems. To ensure carriage on the largest systems in any particular market, Allbritton must negotiate retransmission consent with companies substantially larger than Allbritton. Indeed, Allbritton estimates that 5 entities control more than 75% of the MVPD homes served by Allbritton’s television stations.

Consideration. The virtual monopoly position of cable carriers for multichannel distribution in 1993 when the retransmission consent era began led operators to stand in lock-step with one cable industry executive, declaring that they would not pay one nickel for existing broadcast programming – but were willing to pay for some “added value.” For the first dozen years – four full cycles of must-carry/retrans periods – broadcasters essentially received no cash. Indeed, “Must See TV” was *free* TV for the MVPDs. Some broadcasters were able to gain

carriage of second channels and eke out limited advertising buys from the system operators. None of this remotely matched the value provided by stations to the cable operators. But there was no choice; broadcasters had no alternatives for multichannel distribution. With the advent of technological alternatives, this ability by system operators to adhere to the “no cash consideration” tactic eroded. Availability of satellite and telco alternatives broke the cable system monopoly. Since 2005, the resulting retransmission consent negotiations have become more contentious as carriers attempt to limit payments and stations attempt to maximize them. MVPDs are reluctantly paying monetary consideration for access to our programming. But even today, average subscriber fees paid by MVPDs in markets where our stations carry the top-rated programming remain a tiny fraction of the fees that MVPDs pay national cable networks. These national networks garner \$4.00 or more per subscriber per month, but they do not offer the most popular programming; do not offer any local programming; and do not have any local employees, any community involvement, or any nexus to local consumers. At the same time, evolution in distribution technology means that fewer of our viewers get their local television news over-the-air, and more turn to MVPDs. On a station group basis, we negotiate with several hundred MVPDs, each requiring separate carriage negotiations. The challenge in these negotiations is to value the *quid pro quo* – programming for carriage. It is a challenge for the respective parties – not the government. ***The Commission has no special expertise in valuing programming or distribution and there are no special public interest criteria that enhance either side of the equation more than the other.***

What the MVPDs bemoan is that their leverage position in the negotiation is changing; they no longer command the absolute position that limits their program payments. Technological competition now allows broadcasters to choose among carriers and potentially still provide service using MVPDs even if not on all platforms. The Petition for Rule Making is the MVPDs attempt to reestablish their lost leverage, ignoring the fact that, for a decade and a half, the skewed monopoly-based distribution marketplace also skewed the valuation of programming. ***It is not the government’s role to jump back in to “adjust” the leverage positions of the parties in light of the technological competition that the government itself encouraged.*** Satellite and telco distribution providing subscribers choices for program delivery eliminated the stranglehold that cable operators had on the negotiating process. The free market

of valuing programming and distribution now, in fact, is starting to work. The continued provision of local news and local service simply will not continue if the FCC now moves backwards to erase the technological progress and again restrict the marketplace for local television signals.

Loss of Service. Notwithstanding the hurdles to the negotiating process in valuing consideration offered by programmers and distributors alike, we do not deem the retransmission consent system as “broken.” This is so even in a system where the providers of the most-watched content get pennies to the dollar paid to many of the cable networks. Having reviewed our retransmission consent negotiation history, viewers have been *unaffected for 99.9982%* of the almost 20 years since the advent of the retransmission consent regime. Indeed, in that time, the Allbritton stations collectively produced about 55,480 days of programming, and retransmission consent negotiations caused exactly *one* station to be off the air for exactly *one* of those days, or 0.0018% of that time. This data confirms that, if ever there was a solution in search of a problem, the Commission’s NPRM is it. The free market system serves both broadcasters and MVPDs, and it serves them well.

GOOD FAITH

Blackout Impact. Allbritton has subscribed to a practice of focused, results-driven, good-faith negotiations – not because governmental rules require it, but because it is smart business. It is well within our best interest to reach a carriage agreement because service disruptions harm our stations, our viewers, our advertising clients and our bottom line. In the days before contract expiration, we have found ourselves contemplating lost ad buys, severed advertising relationships, and most importantly, the coveted viewers who may stray from our airwaves – and stay away. In the last instance, we are keenly aware of the damage done by forcing our loyal fans away from the local news brand we spend so much time and effort in promoting. Other channels and media outlets are *immediately* available to viewers and to advertisers. And since the overwhelming majority of station revenues derive from advertising sales, even limited blackouts can be financially debilitating. The harm to us is immediate and palpable.

On the other hand, MVPDs have a longer and softer “landing zone,” which exacerbates the MVPDs’ ability to push broadcasters to brinkmanship. Many MVPDs offer hundreds of

channels on numerous systems in multiple markets – so the loss of one is at most a “blip” on a much larger radar screen. Moreover, in an effort to curtail customers’ ability to switch carriers during a carriage impasse, MVPDs charge early termination fees to lock customers into agreements, even if they might prefer to switch so that they can continue to receive the most popular local stations. Incentives for MVPDs to reach carriage agreements in good faith are few and far between, and this is apparent in negotiations.

Bad Faith Tactics. At the same time, recognizing their Goliath-stature in individual negotiations, MVPDs have made negotiations challenging at times – including use of abusive, bad-faith tactics by some of the multibillion dollar conglomerates we rely on for distribution. For example, once compromise terms were settled, one carrier decided to change those terms on the *eve of the deadline* and refused an extension, hoping to leverage the situation to a more favorable end. In another case, the carrier directed its subscribers to personal email accounts of the station and its parent corporate managers and flooded personal voicemail accounts in an effort to “impose maximum pain” during negotiations. Other tactics have included an MVPD filing a frivolous antitrust lawsuit against one of our stations, again with the intent of forcing a more favorable set of terms. We agree that, in these rare situations, the Commission should act to enforce its existing rules within no more than a few days. Yet, because the Commission either ignores or takes months to act on complaints demonstrating bad faith tactics, turning to the Commission for relief in the cases outlined above would have been a costly and largely fruitless undertaking on our part.

ASSESSING GOVERNMENT INTERVENTION

Onerous government intervention to ameliorate (and indeed, not necessarily solve) a problem that affects in our case ***eighteen one-thousandths percent of television viewing time*** is unnecessary and wasteful. It would be bad public policy and it would produce poorer choices for consumers. In Allbritton’s experience, the mere threat of FCC rule or policy changes regarding retransmission consent negotiations has had the perverse effect of stalling and discouraging negotiations by certain operators. Efforts to gain the favor of key government regulators necessarily distract both sides from the most important task at hand: negotiating with each other in good faith. For example, with three months remaining on an existing retransmission

agreement, one of the largest distributors in the country refused to negotiate – or even talk to us – for more than two months after we had an initial face-to-face session. With our long-term retransmission consent agreement expiring, this distributor finally contacted us just one week before the deadline to present a bad faith, frivolous counter-proposal not based on competitive marketplace conditions. Given the impending deadline, we proposed a short extension to conduct good faith negotiations. This distributor refused to consider any extension. Instead, this distributor deliberately ran out the clock to force us to choose between accepting unreasonable terms or losing carriage on a major distributor in each of our markets. Behind this gamesmanship was the apparent belief that the Commission would be more persuaded to grant the relief sought in the Petition for Rule Making if that distributor “was forced” to drop all of Allbritton’s television stations.

Non-Rate Issues. Moreover, gaining carriage is not always a matter of dollars and cents. In our experience, carriage negotiations frequently resolve rate issues early in the process but we have found the non-rate issues like channel placement, co-promotion agreements, multicast carriage, most favored nation clauses, spotbeam capacity, and after-acquired stations to be the stumbling points. These deal points are, at their core, business considerations, and a government solution would prove unworkable for both parties.

Consumer Notice. With respect to providing mandatory notice to station viewers about potential blackouts, the Commission needs to consider carefully the *unintended consequences* of such action. It is not difficult to posit a viewer being subjected to a loss of channel threats *every single* day – multiple times from multiple stations. Many stations are in markets with scores of MVPDs that carry the station’s programming. Retransmission agreements with those carriers do not all terminate at the same time; the term lengths do NOT correspond with the Commission’s three-year “Must Carry” notice cycle. In fact, at any one time, several agreements may be in various stages of negotiation. To mandate an arbitrary notice period in each of these cases would either confuse the viewer who may not be a subscriber of the MVPD whose agreement is expiring or be seen as background “noise” since these notices would constantly appear – the viewer would simply ignore them. Think of a system subscriber in a geographically large DMA with more than 50 cable systems and 6 broadcast stations each negotiating with the various operators at different times. Even if the notice requirements were just limited to the broadcast

stations only and not imposed on the system operators who would schedule those notices throughout their channel lineups, the number of consumer notices could be staggering -- *whether or not there was any dispute between the carriers and broadcasters*. Moreover, the financial impact of dedicating advertising time on stations with hundreds of retransmission consent agreements for multiple notices could be significant. The notices will consume large amounts of advertising inventory – the lifeblood of the stations. Most of these notices may fall on deaf ears – simply ignored as more “ad clutter.” Mandatory notices by broadcasters should not be part of the Commission’s retransmission consent rules.

At the same time, the Commission *should consider* it to be a “good faith” violation if a MVPD retaliates against a broadcaster if it chooses to inform its viewers of an impending potential blackout. We have experienced several cases where viewer notices were characterized by distributors as “poisoning the well” and resulted in additional issues and delay in finalizing agreements.

Program Exclusivity. The industry model for free, over-the-air broadcasting which brings public interest service to **local** communities is rooted in stations’ ability to maintain “franchise areas.” The complex, interrelated regimes of copyright law, communications policy and entrenched, privately negotiated contracts support this model. Tinkering with specific aspects of the interrelated system in isolation risks unintended, cascading or daisy-chain effects that the Commission should not attempt cavalierly as a sidelight in this limited proceeding relating to MVPD carriage of broadcast programming. Valuing the programming side of the complex programming/distribution equation is tied to its exclusivity in any local market. Restricting or manipulating that exclusivity by changing the Network Non-Duplication and Syndicated Exclusivity rules to permit importation of duplicating programming, radically changes the dynamic between the parties. We have had retransmission consent negotiations, for example, in which a carrier has threatened to import distant, duplicating programs into our markets, ***wrongfully claiming*** that they were being delivered to viewers without over-the-air access to our broadcast signal or ***wrongfully alleging*** that the imported signal was “significantly viewed” by viewers in our stations’ markets. Our ability to rely on the Commission’s rules properly applied avoided the complete collapse of the value proposition for our programming notwithstanding our privately negotiated network affiliation contracts and syndicated program

licenses that “ensured” exclusivity. For the Commission to use this proceeding to change dramatically the valuation relationship of programming and distribution without fully understanding the unintended consequences of such action would backhandedly undermine more than a half-century of communications policy. Such action deserves a comprehensive, thoughtful, holistic review that is not contemplated in this proceeding.

FCC Intervention. Importantly, using Commission intervention as a “steam valve” in these negotiations would remove both sides’ impetus to truly focus on good faith dealings, which would be a direct affront to the Commission’s very goals in these proceedings. Until now, Allbritton has had a virtual universal success rate with existing free market negotiations, and we anticipate the revisions proposed in the Petition for Rule Making in this docket leading to far more difficult negotiations, more incentives for declaring an impasse and ending negotiations, and therefore an increased likelihood of blackouts. The Commission can and should avoid this outcome by committing to act on any complaints alleging violation of existing rules on an expedited basis, and by closing this proceeding without revising any of the existing rules governing retransmission consent negotiations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerald N. Fritz", is written over a horizontal line.

Jerald N. Fritz
Senior Vice President
Legal and Strategic Affairs

Claire Magee
Assistant General Counsel

Allbritton Communications Company